

## § 348.2

testimony and swear that all statements of fact contained in the proposed testimony are true and correct to the best of his or her knowledge, information, and belief.

[59 FR 59160, Nov. 16, 1994]

### § 348.2 Procedures.

(a) All filings under this part must be made electronically pursuant to the requirements of §§ 341.1 and 341.2 of this chapter. A carrier seeking privileged treatment for all or any part of its filing must submit a request for privileged treatment in accordance with § 388.112 of this chapter.

(b) A carrier must provide a copy of its letter of transmittal and its proposed form of protective agreement to each shipper and subscriber on or before the day the material is transmitted to the Commission for filing.

(c) A letter of transmittal must describe the market-based rate filing, including an identification of each rate that would be market-based, and the pertinent tariffs, state if a waiver is being requested and specify the statute, section, subsection, regulation, policy or order requested to be waived. Letters of transmittal must be certified pursuant to § 341.1(b) of this chapter.

(d) An interested person must make a written request to the carrier for a copy of the carrier's complete application within 20 days after the filing of the application. The request must include an executed copy of the protective agreement. Any objection to the proposed form of protective agreement must be filed under § 385.212 of this chapter.

(e) A carrier must provide a copy of the complete application to the requesting person within seven days after receipt of the written request and an executed copy of the protective agreement.

(f) A carrier must provide copies as required by paragraphs (b) and (e) of this section by first-class mail or by other means of transmission agreed upon in writing.

(g) Any intervention or protest to the application must be filed within 60 days after the filing of the application and must be filed pursuant to §§ 343.2 (a) and (b) of this chapter. A protest

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must also be telefaxed if required by § 343.3(a) of this chapter.

(h) A protest filed against an application for a market power determination must set forth in detail the grounds for opposing the carrier's application, including responding to its position and information and, if desired, presenting information pursuant to § 348.1(c).

(i) After expiration of the date for filing protests, the Commission will issue an order in which it will summarily rule on the application or, if appropriate, establish additional procedures and the scope of the investigation.

[59 FR 59160, Nov. 16, 1994, as amended by Order 714, 73 FR 57537, Oct. 3, 2008; Order 769, 77 FR 65475, Oct. 29, 2012]

## PART 349—DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

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AUTHORITY: 42 U.S.C. 7101–7352; 49 U.S.C. 1, *et seq.*

SOURCE: Order 675, 71 FR 9708, Feb. 27, 2006, unless otherwise noted.

### § 349.1 Notice to audited person.

An audit conducted by the Commission or its staff under authority of the Interstate Commerce Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided

to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond to the initial Commission order concerning a notice of deficiency, audit report or similar document with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

[Order 675-A, 71 FR 29785, May 24, 2006]

#### **§ 349.2 Response to notification.**

Upon issuance of a Commission order that notes a finding or findings, or proposed remedy or remedies, or both, in any combination, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and/or proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and/or any proposed remedies with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure, or, if

there are material facts in dispute which require cross-examination, a trial-type hearing.

#### **§ 349.3 Shortened procedure.**

If the audited person subject to a Commission order described in § 349.1 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedy or remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

#### **§ 349.4 Form and style.**

Each copy of such memorandum must be complete in itself. All pertinent data should be set forth fully, and each memorandum should set out the facts and argument as prescribed for briefs in § 385.706 of this chapter.

**§ 349.5****18 CFR Ch. I (4–1–16 Edition)****§ 349.5 Verification.**

The facts stated in the memorandum must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses if hearing were had to testify as to the facts stated in the memorandum.

**§ 349.6 Determination.**

If no formal hearing is had the matter in issue will be determined by the Commission on the basis of the facts and arguments submitted.

**§ 349.7 Assignment for oral hearing.**

Except when there are no material facts in dispute, when a person does not consent to the shortened procedure, the Commission will assign the proceeding for hearing as provided by subpart E of part 385 of this chapter. Notwithstanding a person's not giving consent to the shortened procedure, and instead seeking assignment for hearing as provided for by subpart E of part 385 of this chapter, the Commission will not assign the proceeding for a hearing when no material facts are in dispute. The Commission may also, in its discretion, at any stage in the proceeding, set the proceeding for hearing.